LLR: Insurance & Reinsurance

COURT OF SESSION
(OUTER HOUSE)

10 October 2017

SOUTHERN ROCK INSURANCE CO LTD
v
HAFEEZ

[2017] CSOH 127

Before Lady PATON

Insurance (motor) —Presentation of the risk —Misrepresentation —Whether assured had misrepresented residence address —Right of insurers to avoid policy —Consumer Insurance (Disclosure and Representations) Act 2012 —Road Traffic Act 1988, sections 151 and 152.

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() () This was an application by Southern Rock under section 152 of the Road Traffic Act 1988 for a declaration as to its right to avoid a policy of motor vehicle insurance covering third party, fire and theft, issued to Hadar Hafeez on 27 March 2015, as varied on 31 October 2015, in respect of a Ford Fiesta.

() On 25 January 2016 at 375 Calder Street, Govanhill, Glasgow, Hadar's younger brother, Hussain, took Hadar's car keys without his knowledge or permission, and drove the Ford Fiesta car. He had an accident, crashing into three parked cars. Hussain pleaded guilty to four motoring charges. The insurer faced claims from the three owners under section 151 of the Road Traffic Act 1988, on the ground that the insurer was liable for claims against the driver of a vehicle even though the driver's use of the vehicle was unauthorised. The insurer sought a declaration of a right to avoid the policy under section 152 of the 1988 Act, whereby a declaration could be sought against a consumer assured where the insurer had the right to avoid the policy under the Consumer Insurance (Disclosure and Representations) Act 2012.

0 The insurer argued that Hadar had, in order to secure the policy, represented that he resided at 6 Dinard Drive, Giffnock, and that the vehicle was kept there, whereas in fact Hadar resided at 375 Calder Street, Glasgow. The insurer claimed that there was a right to avoid under the 2012 Act, in that the representation was either deliberate or reckless. Hadar's defence was that no misrepresentation had been made.

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0 ———*Held*, by CSOH (Lady PATON) that the application for a declaration would be refused.

0 (1) There were three underwriters to the policy, but the policy made it clear that each insurer was severally liable under the policy and not jointly and severally liable. The insurer was entitled to avoid its liability under the policy, irrespective of what any other underwriter wished to do (*see* para 39);

0 ———*Webster v Laing's Patent Overhead Handstitch Sewing Machine Co Ltd* (1885) 12 R 416, *D & J Nicol v Dundee Harbour Trustees* [1915] AC 550; 1915 SC (HL) 7, *Napier and Ettrick v R F Kershaw Ltd* [1997] LRLR 1, applied.

0 (2) There was no misrepresentation.

(a) Under the Consumer Insurance (Disclosure and Representations) Act 2012, the onus was upon the insurer to prove that Hadar either deliberately or recklessly misrepresented his address as 6 Dinard Drive. When assessing whether a representation was made deliberately or recklessly, all the circumstances had to be taken into account, including the type of communication used, the terms of any question put and the opportunity given to the consumer to qualify or particularise any response, or to provide non-standard information (*see* para 73).

(b) On the evidence, Hadar interrogated computer websites designed to allow the consumer to carry out a comparative search amongst various insurance companies to find suitable terms and a premium, enabling the consumer to proceed to purchase a particular insurance. One consequence arising from that online processing of questions and answers was that, in this particular case, this court had no clear evidence about the precise wording of the contemporaneous questions which appeared on the computer screen in either the comparative website or the chosen insurers' website (*see* para 75).

(c) In those circumstances, the contention that Hadar "deliberately" or "recklessly" misrepresented to the insurers that his address was "6 Dinard Drive, Giffnock" could only be established if it could be proved that, at the time of seeking the insurance, Hadar could not, on any view, claim 6 Dinard Drive as his "address". On the balance of probabilities, Hamid lived partly at 6 Dinard Drive and partly at 387 Calder Street. The information that Hadar's "address" was "6 Dinard Drive, Giffnock" could not be categorised as a deliberate or reckless misrepresentation (*see* para 80).

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The following cases were referred to in the judgment:

(LLR:1985010001)
Armagas Ltd v Mundogas SA (The Ocean Frost) (CA) [1985] 1 Lloyd's Rep 1
(/ilaw/doc/xref.htm?citation_dest=LLR:1985010001);

(1915AC550)
D & J Nicol v Dundee Harbour Trustees (HL) [1915] AC 550; 1915 SC (HL) 7;

(LRLR:1997010001)
Napier and Ettrick v R F Kershaw Ltd (CA) [1997] LRLR 1;

(LLR:1994020427)
Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd (HL) [1994] 2 Lloyd's Rep 427
(/ilaw/doc/xref.htm?citation_dest=LLR:1994020427); [1995] 1 AC 501;

(188512R416)
Webster v Laing's Patent Overhead Handstitch Sewing Machine Co Ltd (1885) 12 R 416.

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() () Mr T Young, instructed by Brodies LLP, for Southern Rock; Mr Davies, instructed by TLT LLP, for Mr Hafeez.

Tuesday, 10 October 2017

JUDGMENT

Lady PATON

() 1. On 25 January 2016 at 375 Calder Street, Govanhill, Glasgow, a teenager named Hussain Hafeez took his older brother's car keys without his knowledge or permission, and drove his brother's red Ford Fiesta car. He had an accident, crashing into three parked cars (a Mercedes, an Audi, and a Ferrari). He left the scene of the accident and returned on foot to Calder Street to get help. His brother, the defender, took a taxi to the scene of the accident. Police officers and vehicle recovery personnel were present. The defender explained that the car belonged to him and that his brother had taken it without his authority. The police accompanied the defender to Calder Street where they interviewed and charged Hussain. Ultimately Hussain pled guilty to four charges: taking and driving without consent, driving without insurance, careless driving, and leaving the scene of an accident.

() 2. The defender had taken out a motor insurance policy (third party, fire and theft). In terms of that policy, he was the only person entitled to drive the car. After the accident, the car owners submitted claims. The defender's insurer (the pursuer) sought to avoid the policy on the ground that the defender had made a misrepresentation. When taking out the policy, the defender had given his address as "Dinard Drive, Giffnock", not Calder Street, Govanhill, Glasgow. As the insurer explained by letter to the defender dated 14 June 2016 and sent to both addresses:

". . . In order to secure [the motor insurance] policy you represented that you resided at 6 Dinard Drive Giffnock, Glasgow, G46 6AH and that the vehicle was kept there. It has come to our attention that you did not reside at the address on the policy. Your driving licence and V5 for the vehicle registration number PE10 ACY is registered to 375 Calder Street, Glasgow, G42 7NU and you also appear on the electoral roll at this address.

We believe you resided at 375 Calder Street G42 7NU, which is also the address from where the vehicle was taken by your brother, Mr Hussain Hafeez, without your consent. We believe you misrepresented your home address, and where the vehicle was kept, to us in order to influence our judgment in determining whether to agree to insure you and the appropriate level of premium having regard to risk . . .

We consider that you made the above representation deliberately and knew that this was false. Alternatively, in so far as the misrepresentation was not deliberate, it was made recklessly, not caring whether it was true or otherwise . . .

By reason of the matters set out above we are entitled to avoid the policy of insurance . . . and by this letter exercise that right.

We put you on notice we will not be indemnifying you for any claim that has arisen as a result of a motor accident on 25th January 2016 or any claim whatsoever arising during the period for which the policy was issued . . ."

0 3. The insurance premium based on the Giffnock address was £1,649.34; the premium based on the Govanhill address would have been £2,899.08.

0 4. As the insurer was vulnerable to claims from the owners of the damaged cars in terms of section 151 of the Road Traffic Act 1988, it raised the present action seeking a declarator, as amended at the proof before answer, in the following terms:

"1. For declarator in terms of section 152(2) of the Road Traffic Act 1988 that the pursuer was and is entitled to avoid the whole policy of insurance, policy number GSPC7020320810, in respect of a Ford Fiesta Zetec ('the Car'), registration number PE10 ACY, which policy was granted by the pursuer to the defender on or about 27 March 2015, as varied to include the Car on or about 31 October 2015."

0 5. The defender lodged defences, averring inter alia that no misrepresentation had been made.

Relevant legislation

Road Traffic Act 1988

"Section 151 **Duty of insurers . . . to satisfy judgment against persons insured . . . against third-party risks**

. . .

(5) Notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy or security, he must, subject to the provisions of this section, pay the persons entitled to the benefit of the judgment –

(a) as regards liability in respect of death or bodily injury, any sum payable under the judgment in respect of the liability [together with interest] . . .

(b) as regards liability in respect of damage to property, any sum required to be paid under subsection (6) below, and

(c) any amount payable in respect of costs . . .

Section 152 **Exceptions to section 151**

. . .

(2) Subject to subsection (3) below, no sum is payable by an insurer under section 151 of this Act if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration –

(a) that, apart from any provision contained in the policy . . . he is entitled to avoid it either under the Consumer Insurance (Disclosure and Representations) Act 2012 or, if that Act does not apply, on the ground that it was obtained –

(i) by the non-disclosure of a material fact, or

(ii) by a representation of fact which was false in some material particular, or

(b) if he has avoided the policy . . . under that Act or on that ground, that he was entitled so to do apart from any provision contained in the policy . . .

and for the purposes of this section, "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and if so, at what premium and on what conditions."

Consumer Insurance (Disclosure and Representations) Act 2012

"Section 2 **Disclosure and representations before contract or variation**

. . .

(2) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer . . .

(4) The duty set out in subsection (2) replaces any duty relating to disclosure or representations by a consumer to an insurer which existed in the same circumstances before this Act applied.

Section 3 **Reasonable care**

(1) Whether or not a consumer has taken reasonable care not to make a misrepresentation is to be determined in the light of all the relevant circumstances.

(2) The following are examples of things which may need to be taken into account in making a determination under subsection (1) –

(a) the type of consumer insurance contract in question, and its target market,

(b) any relevant explanatory material or publicity produced or authorised by the insurer,

(c) how clear, and how specific, the insurer's questions were . . .

Section 4 **Qualifying misrepresentations: definition and remedies**

(1) An insurer has a remedy against a consumer for a misrepresentation made by the consumer before a consumer insurance contract was entered into or varied only if –

(a) the consumer made the misrepresentation in breach of the duty set out in section 2(2), and

(b) the insurer shows that without the misrepresentation, that insurer would not have entered into the contract (or agreed to the variation) at all, or would have done so only on different terms.

(2) A misrepresentation for which the insurer has a remedy against the consumer is referred to in this Act as a 'qualifying misrepresentation'.

(3) The only such remedies available are set out in Schedule 1.

Section 5 **Qualifying misrepresentations: classification and presumptions**

(1) For the purposes of this Act, a qualifying misrepresentation (see section 4(2)) is either –

(a) deliberate or reckless, or

(b) careless.

(2) A qualifying misrepresentation is deliberate or reckless if the consumer –

(a) knew that it was untrue or misleading, or did not care whether or not it was untrue or misleading, and

(b) knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer.

(3) A qualifying misrepresentation is careless if it is not deliberate or reckless.

(4) It is for the insurer to show that a qualifying misrepresentation was deliberate or reckless.

(5) But it is to be presumed, unless the contrary is shown –

(a) that the consumer had the knowledge of a reasonable consumer, and

(b) that the consumer knew that a matter about which the insurer asked a clear and specific question was relevant to the insurer.

. . .

SCHEDULE 1

Part 1

Contracts . . .

Deliberate or reckless misrepresentations

2 If a qualifying misrepresentation was deliberate or reckless, the insurer –

(a) may avoid the contract and refuse all claims, and

(b) need not return any of the premiums paid, except to the extent (if any) that it would be unfair to the consumer to retain them.

. . .

3 If the qualifying misrepresentation was careless, paragraphs 4 to 8 apply in relation to any claim . . ."

Proof before answer

() 6. A proof before answer took place in June 2017. The evidence for the insurers included productions, a joint minute, and the oral evidence of Miss Melanie Liston who used to live at 387 Calder Street. The evidence for the defender included productions, the joint minute, and the oral evidence of the defender, his brother Hussain, and his uncle and cousin (in fact family friends) Abdul Majid and Kashif Majid.

The documentary evidence

() 7. The joint minute agreed many of the productions. Other productions were spoken to by witnesses in evidence. In particular, attention was drawn to:

A printed "private car proposal form" (6/2): In the printed form, a box labelled "Address" was completed in typescript as "6 Dinard Drive, Giffnock, Glasgow G46 6AH". One question 2(viii) "Address where car is kept (if different to address above)" was unanswered.

A certificate of motor insurance for a Ford Fiesta (6/3): In the certificate, the underwriters were listed as: (i) Southern Rock Insurance Co Ltd – the pursuer; (ii) Alwyn Insurance Co Ltd; and (iii) Pinnacle Insurance plc.

A copy of the defender's driving licence (6/8): showing the defender's address as 0/1, 375 Calder Street, Glasgow G42 7NU.

A copy of the vehicle registration form V5 for a Ford Fiesta (6/7): In the court's copy, the content of the address box was illegible, but the defender accepted that the address shown was flat 0/1, 375 Calder Street.

The history of the insurance contract, and matters agreed between the parties

() 8. Paragraphs 5 to 8, 10 and 20 of the pursuer's written submissions record the following matters, which were not challenged by the defender:

"5. The basic facts in relation to the policy of insurance are not in dispute.

6. In March 2015, the defender obtained a policy of insurance in respect of a motor vehicle (namely a grey Nissan Micra vehicle with registration number BK55 DHJ) with policy number GSPC7020320810 (the 'Policy'). In October 2015, he varied the Policy by changing the details of the vehicle insured to a Ford Fiesta Zetec with registration PE10 ACY (the 'Ford Fiesta').

7. It is agreed that productions number 6/2 – 6/3 and 6/12 of process are copies of the policy booklet, the motor insurance schedule, the certificate of motor insurance, and the private car proposal form, as varied: see joint minute of admissions. These together form the contract of insurance: see page 4 of the policy booklet (number 6/12 of process).

8. It is admitted that, in applying for the Policy in March 2015 and again when varying the Policy in October 2015, the defender represented that his residence and the place where he kept the vehicle was in a garage at 6 Dinard Drive, Giffnock, Glasgow G46 6AH . . .: see, in particular, the private car proposal form (production 6/2). . . .

10. In particular, it is not controversial that:

i. The lease of 387 Calder Street was taken in the name of the defender in 2014.

ii. The lease of 375 Calder Street was taken in the name of the defender in mid-2015 . . .

iii. He obtained a fresh driving licence in May 2015. On the evidence, this was right around when the move from 387 Calder Street to 375 Calder Street occurred. In doing so, he put 375 Calder Street as his address: see driving licence at production 6/8 of process.

iv. He acquired the Ford Fiesta near the end of 2015. In completing the registration document, he put 375 Calder Street as his address: see vehicle registration document (production 6/7).

v. The defender and the Ford Fiesta were at 375 Calder Street on 25 January 2016 when it was taken by his brother at night and crashed.

vi. The defender himself admits to residing [at number 375] from, at least, March 2016.

vii. The defender accepted in evidence that everything in his name (ie bank accounts, council tax, utility bills, wage slips, his licence

with the Security Industry Authority) were at 375 Calder Street . . .

20. . . . the parties have agreed that, had the defender represented that he kept his vehicle at Calder Street, the premium payable would have been £2,899.08: see para 8 of joint minute of admissions."

Summary of evidence

0 9. Melanie Liston (aged 18) lived with her mother in a ground floor flat at 387 Calder Street, Govanhill, Glasgow from 2009 until 2016. In about 2014 she became friendly with Insha Hafeez, the defender's sister, who had moved into the top flat. They met in the back green where Insha played with her small child. Miss Liston also had a young child.

0 10. Miss Liston understood that Insha and her child lived in the flat along with the defender and his brother Hussain. She met the defender in about 2014. She did not know him, but would say "Hi" and "Bye" if they met either in Insha's flat or nearby. She saw him fairly regularly, for example leaving the tenement building in the morning, or returning there in the afternoon when Miss Liston was waiting for her son coming home from school. Miss Liston said that she could see much of what was happening outside from the front room of the ground floor flat.

() 11. In relation to cars, Miss Liston saw the defender using a silver grey Nissan Micra which was often parked outside in Calder Street. She was once driven by the defender in that car, as she wanted to show Insha and her child a softplay centre (Wonderworld) and the defender had given them a lift.

() 12. In about mid-2015, Insha moved to a nearby flat 375 Calder Street, situated on the corner of Calder Street and Riccarton Street. As far as Miss Liston was aware, all the occupants of the top flat moved there. After they moved, Miss Liston visited and kept in touch with Insha, but did not discuss the living arrangements in the new flat. She saw the defender less frequently.

() 13. Summarising her evidence in relation to cars, Miss Liston confirmed that she had seen the grey car every day, parked in Calder Street, from about 2014 until the move to 375 in mid-2015. After the move, she thought that she had not seen the grey car, although she was not sure why not. From about the beginning of 2016 she had noticed a red Ford parked outside 375, but had never seen the defender driving it.

() 14. In relation to where the defender lived, the following exchange took place in evidence in chief:

"Q How do you know that Hafeez lived there [ie in Insha's flat]?

A His sister told me some of his stuff was in the flat.

Q What sort of stuff?

A Clothes – and he slept there.

Q [from the bench, requesting the answer to be repeated].

A Clothes and sleeping gear.

() 15. In cross-examination, the following exchange took place:

Q You didn't see [the defender] very often?

A Now and again, we were civil: we said 'Hi' and 'Bye'.

Q You did not know if he was living there?

A I went on what Insha said, and seeing him coming and going.

Q He might have been visiting, to look after his sister and brother?

A He could have been. It's none of my business where he was staying."

() 16. The defender (aged 24) gave evidence that he had bought the Nissan Micra silver grey car in about 2015 from his cousin, or rather his uncle Abdul Majid. When he bought the car, he was living at his uncle's five-bedroom house with two-door garage at 6 Dinard Drive, Giffnock, along with Mrs Majid, their son Kashif, and a younger son. The defender's parents used to live in Glasgow, but had gone to Pakistan. The defender had grown up in Glasgow and had decided to return there from Gloucester. At the request of the defender's father (and the defender), Mr Majid had agreed to let him stay in a spare bedroom at 6 Dinard Drive. He had moved into Dinard Drive in about 2012 to 2013.

() 17. The defender stated that his younger sister and brother, Insha and Hussain, decided to follow him to Glasgow. As the defender was in employment as a security officer with Total Security Services and could exhibit wages slips, he was in a better position than his sister and brother to satisfy a landlord about credit history. Using a letting agency, he acquired a lease of the flat at 387 Calder Street. The lease was in his name alone. His brother and sister moved in. However the defender said that he continued living at 6 Dinard Drive. Calder Street was about 15 to 20 minutes' drive by car from Dinard Drive. The defender visited Calder Street frequently, every other day, after work or before work. Before he bought the Nissan car, the defender would ask his uncle or cousin for a lift, or else he would take public transport. After some time Insha and Hussain moved to 375 Calder Street. Again the defender had arranged for the lease to be in his name.

() 18. In relation to where he was living throughout these years, the defender said in evidence-in-chief

that he was not living at Calder Street, although he might stay overnight if his brother and sister asked: "It just depends". As noted in the written submissions for the pursuer (para 10vi) and in Answer 1 of the pleadings, the defender accepted that he was living at 375 Calder Street from March 2016 onwards.

() 19. In relation to obtaining insurance for the Nissan car and then the Ford car, the defender explained that he used the Google search on a computer. He checked the websites "moneysupermarket.com" and "comparethemarket.com". There was an online form to fill in, and he provided information. When he bought the car (March 2015) he was staying at 6 Dinard Drive, so he provided that address. The car was sometimes parked in the driveway, and sometimes in the garage, depending who arrived first (Mr Majid had a Skoda Fabia, Mrs Majid had a Toyota Yaris, his cousin had a car, and the defender had the Nissan). When the defender completed the application about the car overnight, he chose "garage".

() 20. One of the computer sites – moneysupermarket.com – gave him a quote. He clicked on that site, and took up the quote. Thereafter he dealt with insurance brokers "GoSkippy". He did not become aware that Southern Rock were the insurers until after the accident in January 2016.

() 21. Later in 2015 the Nissan broke down in Manchester. Rather than pay prohibitive repair costs, the defender traded the car in, and bought a red Ford Fiesta. He telephoned GoSkippy and explained that he had changed cars. They asked him for the new registration, which he gave. They asked if he was still staying at the same address, and he answered "Yes". They asked when he wanted the policy to start. He received an amended insurance certificate and schedule, with insurance commencing on 31 October 2015, and expiring on 26 March 2016. The premium was reduced by £64.66.

() 22. The defender accepted that all his bank statements, credit and debit cards, and correspondence were sent to Calder Street. His licence with the security industry, his driving licence, and the vehicle registration document, gave the Calder Street address. He accepted that he had produced no documentary evidence bearing his name and the address 6 Dinard Drive. He explained that the lease at Calder Street (first 387, then 375) was in his

name: it was easier to have everything registered to that address, and to keep all the documents at one address, "under one roof". He stated that he had no utility bills with his name and address, as he paid online. Council tax was dealt with by the landlord.

() 23. In relation to the printed insurance proposal form, the defender explained that he had filled in boxes online, electronically. He understood that they wanted to know where he was living, and he gave the 6 Dinard Drive address. He stated that if he had seen question 2 (viii) (quoted in para 7 above), he would have put "Calder Street": but he only stayed there one night a week, for a sleepover once a week, although he visited every other day. When asked if he had seen the proposal form at the time (March 2015) he replied "not precisely in that form": he had made the application online.

() 24. After his birthday in 2016 (29 April) he had moved from Dinard Drive to live at 375 Calder Street. His explanation was that his sister had been away in Pakistan and his brother Hussain was lonely, so he thought that he would move back to Calder Street to help him out. As at the date of the proof (June 2017) he and his sister lived at 375 Calder Street, but his brother no longer lived there.

() 25. The defender agreed that Miss Liston knew his sister and came to speak to her. He agreed that his only contact with Miss Liston was "Hello" or "Bye" and that he had once given her and his sister a lift. He commented that Miss Liston could not prove that he was living at Calder Street.

() 26. The defender accepted that there was a considerable difference between a premium of £1,649.34 and £2,899.08, but commented that his uncle would have helped him out if necessary, so it was not a big issue.

() 27. Abdul Majid (aged 64) owned and lived in a detached five-bedroom bungalow at 6 Dinard Drive, Giffnock, Glasgow. He owned a hardware shop in Cumbernauld. Mr Majid knew the defender's father, who used to have a shop at Albert Drive, Glasgow. The defender's parents had moved back to Pakistan about 15 years previously.

() 28. Mr Majid confirmed that the defender had come to live at 6 Dinard Drive in 2013. His father had phoned and asked if he could stay. The defender had also made the request. Mr Majid had agreed, as there was a spare room. The defender now lived at Calder Street, having left Dinard Drive in about April 2016.

() 29. Mr Majid had given the Nissan Micra car to his son Kashif as a birthday present. Kashif wanted a four-door car, and had sold the Micra to the defender. The defender had changed his car while still living at Dinard Drive. He then had a red Ford car.

() 30. In cross-examination, Mr Majid explained that the defender moved out of 6 Dinard Drive because one of Mr Majid's daughters was a professor and needed the spare room. He understood that the defender had a sister and brother in Calder Street. During the period 2013 to 2016, the defender sometimes slept overnight at Calder Street. When

asked whether the defender used to park his car in Calder Street, Mr Majid did not know, but commented that before the defender had a car, he (Mr Majid) would sometimes drop him off at Calder Street.

0 31. The defender had not been registered for council tax at Dinard Drive. When asked about the defender's correspondence and bank accounts, Mr Majid stated that letters for the defender came to Dinard Drive.

0 32. Mr Majid concluded by confirming that the defender had lived at Dinard Drive for about three or four years, although he was sometimes at Calder Street

0 33. Hussain Hafeez (aged 20), the defender's younger brother, stated that he was currently living with friends in Darnley, Glasgow G53. He had gone back to Pakistan with his parents in 2005, and lived with them in Lahore until about 2012 to 2013. On 20 March 2014 he travelled to Gloucester, England. After about two months, he moved to Glasgow. There he lived with a friend in Cathcart Road until he moved to live with his sister Insha at 387 and then 375 Calder Street. However at times he also lived in friends' houses.

0 34. Hussain qualified any evidence about where the defender lived with a comment that "We're not that close so I don't know too much." He thought that the defender was at 387 Calder Street first of all, and then went to his uncle's house (Mr Majid at Dinard Drive). He knew that the defender had been at his uncle's house for two to three years. The defender came back to 375 Calder Street in about April 2016, at a time near his birthday (which was on 5 March).

0 35. Hussain described the time of the accident in January 2016. The defender was "with his uncle at the time" but had come over because their sister was in Pakistan. The two of them had bought food and eaten together. After the meal, the defender went to bed (although in cross-examination Hussain explained that it was not the defender's bed). Hussain then took his car without his permission. The accident occurred. Hussain ultimately pled guilty to four charges. He stated that he had got his brother into a lot of trouble. He never wanted to drive again.

0 36. So far as Hussain was aware, the defender "came and went as he pleased", sometimes living at Calder Street and sometimes at his uncle's. He would stay a couple of months at Calder Street, then go back to his uncle. 375 Calder Street came into the picture in the middle of 2015. Hussain stated that he and his brother were in contact now and then. His brother would be "coming and going", and they would check with each other how each was, and where each was staying. When it was put to Hussain in cross-examination that the defender was living at 387 and 375 Calder Street in 2015 to 2016, Hussain replied: "I don't know, to be honest." In re-examination, he stated that in 2015 and 2016 the defender was at his uncle's house.

0 37. Kashif Majid (aged 36) confirmed that he lived at 6 Dinard Drive. He was the manager of a retail store, previously managed by his father. The defender had come to live with his family at Dinard Drive at the end of 2012. The house had five bedrooms. The defender had stayed at Dinard Drive until March or April 2016.

0 38. Mr Majid confirmed that he had sold his Nissan Micra to the defender. He confirmed that the defender went to visit his sister and brother at Calder Street. Mr Majid had first become aware of the sister and brother in 2015 when he dropped the defender off at Calder Street. The defender may have spent some time there, the odd day, but he still had stuff (possessions) at Dinard Drive, and was definitely living at Dinard Drive.

Submissions

For the pursuer

0 39. *Title to sue*. Counsel accepted that there were three underwriters to the policy: (i) the pursuer; (ii) Alwyn Insurance Co Ltd; and (iii) Pinnacle Insurance plc. However clause 7 made it clear that each insurer was severally liable under the policy, not jointly and severally liable (cf *Webster v Laing's Patent Overhead Handstitch Sewing Machine Co Ltd* (1885) 12 R 416, at pages 418 to 419). Thus the pursuer was plainly one of the underwriters, with several liability under the policy, and was liable to be called upon by third parties to perform its obligations under the policy. It therefore had title to sue (*D & J Nicol v Dundee Harbour Trustees*, 1915 SC (HL) 7, pages 12 to 13; *Napier and Ettrick v R F Kershaw Ltd* [1997] LRLR 1). It was entitled to avoid its liability under the policy, irrespective of what any other underwriter wished to do.

0 40. *Misrepresentation*. Counsel invited the court to find that the defender had misrepresented his address, and the place where the vehicle was kept. The pursuer was therefore entitled to avoid its liability under the policy. The action had been raised for the express purpose of engaging the provisions of section 152(2) of the Road Traffic Act 1988, to obtain relief from the obligation of payment to third parties (section 151(1) of the 1988 Act).

0 41. The pursuer did not seek to avoid the policy on the ground of misrepresentation as to whether the car was kept in the garage or on the driveway. Nor did the pursuer rely upon the concept of an average citizen of Glasgow knowing that the premium would be higher for Govanhill than for Giffnock. Further, it was accepted that

there was no evidence that the defender, when interacting with the online insurance websites, had experimented with the Govanhill address and the Giffnock address, and then decided to use the Giffnock address because the premium was substantially lower. The pursuer's case was the straightforward proposition that the defender, knowing that he lived and kept the car at Calder Street, deliberately or recklessly, in breach of his duty to take care to avoid a misrepresentation, misrepresented to the insurers that his address, and the place where the car was kept, was 6 Dinard Drive. That was an issue of pure fact, for the court to determine.

0 42. Counsel submitted that a conclusion of misrepresentation should be reached for several reasons.

0 43. First, the questions in the private car proposal form were straightforward and easily understandable. The defender accepted as much in cross-examination. Accordingly, if the defender was in fact residing at Calder Street, it followed that the defender's answers were a deliberate or reckless misrepresentation.

0 44. Secondly, taking the evidence as a whole, it was established that in March 2015, when the defender took out the car insurance policy, the defender was residing at 387 (and subsequently 375) Calder Street, and not at 6 Dinard Drive. When inviting the court to reach that conclusion, the pursuer relied upon: (i) the clear and unequivocal evidence of Melanie Liston, who was a credible and reliable witness plainly doing her best to tell the truth; (ii) the consistency between Miss Liston's evidence and the independent and

objectively verifiable evidence, namely: the leases being in the defender's name; the Calder Street address being on the defender's driving licence and the defender's V5 form; the defender's car being parked in Calder Street when his brother took it without authority or permission; and the defender's acceptance that he was living at Calder Street as from March 2016; (iii) the fact that the defender's evidence was incredible and unreliable for many reasons (including his having told everyone such as his landlord, the letting agents, the local authority, the DVLA, the banks, and the utility companies, that he was living at Calder Street). Unsatisfactory features of his evidence were pointed out; (iv) the defender's supporting witnesses did not assist. They were neither credible nor reliable. Their evidence was unsatisfactory and inconsistent in many respects; (v) there was no independent verifiable evidence supporting the proposition that the defender's residence was at 6 Dinard Drive. For example, there were no bank statements, council tax records, passports, electoral roll records, wages slips, employment details, HMRC records, or correspondence showing the address 6 Dinard Drive; and (vi) the court, in a case such as this, should place substantial weight on the objective facts proved independently of the defender's oral evidence (Goff LJ in *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1 (/ilaw/doc/xref.htm?citation_dest=LLR:1985010001) at page 57).

0 45. On the evidence therefore, this was a straightforward case of the defender deliberately or recklessly misrepresenting his address in the proposal form. But for that misrepresentation, the pursuer would not have entered into the policy on the terms it did. Accordingly, in terms of the 2012 Act and the 1988 Act, the pursuer was entitled to avoid the policy.

0 46. In response to certain criticisms made by counsel for the defender, counsel for the pursuer ultimately amended the first conclusion of the summons, and invited the court to grant decree.

For the defender

0 47. *Title to sue*. The policy was between three insurers and the defender. It was accepted that the insurers' obligations were several, not joint and several. However the pursuer's action sought to avoid the policy as a whole. Counsel submitted that, where a challenge was made to the contract as a whole, the pursuer had to call all parties to the contract (an argument often summarised in a plea of "all parties not called"). The insurers had a joint interest in the validity (or otherwise) of the policy (cf *Webster*). Seeking to have the whole policy declared void was a matter which affected the other insurers. By analogy with a decree granted ope exceptionis, a decree avoiding the policy arguably affected only the pursuer and the defender: but the defender should not be expected to face further actions from, for example, the other insurers. The present action had not even been intimated to the two other insurers for any interest they might have.

0 48. Further, in the event of any person bringing a claim arising out of the accident, what would the defender's rights be? Would damages be limited to two-thirds? That would be unsatisfactory. The policy stood or fell as a whole. The language of the 2012 Act made it clear that the remedy was to avoid the entire contract, and not part thereof. There was no provision for partial reduction of a policy. The remedy provided by the Act was not the entitlement of one of the insurers to reject part of the claim.

0 49. If aggrieved parties were to sue the defender, they would potentially continue to have claims in terms of section 151(2)(b) against the other two insurers. Only if the policy was reduced would they escape liability to meet any judgment.

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50. The action was accordingly fundamentally flawed.

0 51. *Misrepresentation*. For the pursuer to be entitled to have the policy declared void, the defender's misrepresentation had to be "deliberate" or "reckless": if a representation was merely "careless", that would result only in entitlement to charge a different insurance premium (sections 2 and 3 of the 2012 Act).

0 52. The terms of the questions put by the insurance company were relevant. In this case, the court had not seen the original online questions. Document number 6/2 of process (the printed insurance proposal form) had been generated after the event. It had not been printed at the time of the proposal in March 2015. Thus the form and content of the online questions, as they existed at the time of the proposal, had not been established.

0 53. Further, it was important to bear in mind that not everyone had "one address". In modern society, there were second homes, holiday homes, visits by friends and relatives, visits to hotels. Not everyone stayed every night at one house. There were many circumstances where a person might stay overnight at a different address. But it was not known what the defender was asked. Questions could be in the form: "What is the address where you live?"; "What is the address at which the car will mainly be stored?" Once a consumer such as the defender had completed questions on the "price comparison" website, the consumer clicked on a quote with which he wished to proceed, and was transferred to another website (such as GoSkippy) presumably together with the information supplied on the price comparison website. But it was not known whether the phrasing of the questions on the GoSkippy website were the same as the questions on the comparison website. It was not known how much information given on the comparison website was "auto-filled" into the GoSkippy website. The hard copy insurance proposal form number 6/2 of process had not been seen by the defender at the time of the proposal.

0 54. The question of an address might seem simple, but (for the reasons given above) was not necessarily so. To give a "main address" could not be said to be deliberately or recklessly misleading: the pursuer would have to go so far as to say that the consumer was *not living at that address at all.* Counsel submitted that there was evidence that the defender spent some time at Calder Street, but that his main address was 6 Dinard Drive, and that he lived there. The Majids supported that. For the pursuer to succeed, it was not enough to say that there was a cloud of uncertainty. Nor was it enough if the court were to conclude that the defender was living at Dinard Drive and also going to Calder Street on a regular basis. The pursuer had to go so far as to prove that the defender *was not, on any view, living at Dinard Drive.*

0 55. In relation to question 2(viii) in the private car proposal form (6/2) – "Address where car is kept (if different to address above)" – there was no evidence that the defender saw a question in those terms. There was no evidence about the contemporaneous form of

the questions, or about whether the website allowed for fine adjustments or qualifications in the information given. Counsel submitted that, when considering whether a statement was misleading, it was necessary to know the actual terms of the questions, and the scope for non-standard responses. The pursuer had to prove that, on any view, the defender's answer was wrong.

0 56. Addressing the evidence heard from witnesses, counsel invited the court to treat Miss Liston's evidence with some care. In many ways, she was not a reliable witness (for example, in relation to dates). She had a tendency to overstate the confidence she had in the views she had reached; she did not know the defender's sister and her circumstances particularly well; she did not know the defender, other than to greet him in passing (and she apparently had not recognised him either in his driving licence photograph or as he sat in court during the proof). She accepted that her conclusion that the defender was living in Calder Street was based on what his sister said ("His sister told me some of his stuff was in the flat . . . clothes – and he slept there . . . Clothes and sleeping gear") together with her own observations of the defender coming and going in Calder Street. But it was not disputed that the defender visited Calder Street regularly, and slept there overnight from time to time. It was not therefore surprising that he left some of his belongings there. Counsel submitted that Miss Liston had over-interpreted what she had seen and heard. Furthermore her observations were confined to 387 Calder Street, and did not extend to number 375.

0 57. As for Miss Liston's dates and times concerning her observations of the defender and his cars, these could be shown to be overstated and unreliable when compared with other pieces of evidence. The defender's position was that he did visit the flat in Calder Street on a regular basis, either travelling there by accepting a lift in a car, or by public transport, or in his own car. But Miss Liston had jumped to the wrong conclusion that he was "living there". At the end of her cross-examination, she accepted that the defender could have been "visiting". Accordingly counsel submitted that her evidence that the defender was living at the Calder Street address was not credible or reliable.

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58. In relation to the defender and his witnesses, all the evidence was that, during the critical period (March 2015 to January 2016) the defender was living at Dinard Drive. It was accepted that he visited his brother and sister on a regular basis. That was to be expected, as he was the older sibling and the parents were in Pakistan. His sister had a small child, and the defender was interested in their welfare. His explanation as to why his name was on the Calder Street lease (ie his younger siblings having no credit history) was entirely credible: by contrast, the defender had the advantage of being employed. As for the lack of documentation demonstrating the defender's residence at Dinard Drive, it was the Majids' house, and all bills, council tax notices and so on were in the Majids' name. Some utility bills for Calder Street were dealt with by the letting agents. If it was easier for the defender to use one address (Calder Street) as his "post box", that was not surprising. Proof of address could be difficult for young people. Both the DVLA and the security industry simply wished to have an address at which the defender could be contacted. The defender's own evidence was entirely credible, standing the fact that his parents were abroad, he had friends and relations in the community, and he was a young man at a transient stage of his life. In terms

of personal honesty, the circumstances surrounding the accident (caused by his brother who left the scene of the accident) vouched for his honesty: the defender went to the scene to explain matters and to give the police information. There was no significance in the fact that he was at Calder Street that particular night: if he had not been there, his brother could not have taken the car and the accident would not have happened.

() 59. In relation to a possible motive for giving the insurance company a "wrong address", it had not been put to the defender in cross-examination that he must have realised that there would be a big saving in the premium, and that he deliberately planned to get cheaper insurance. No real motive had been elicited in the evidence.

() 60. The defender's evidence was supported by Abdul Majid and Kashif Majid. Each was a respectable businessman (in Abdul's case, a long-established one). Each had given their evidence in an honest way. They had no particular reason to come to court to lie on the defender's behalf.

() 61. In relation to the defender's brother Hussain, counsel submitted that he was an irresponsible individual, and less weight should be given to his evidence. Nevertheless the core of his evidence was that the defender was staying at Dinard Drive.

() 62. The court was therefore invited to accept the evidence that between March 2015 and January 2016 the defender was living at Dinard Drive, and that his car was regularly parked there.

() 63. Counsel submitted that the court should also bear in mind the fact that the printed proposal form (6/2) had not been available to the defender in March 2015: it had been generated subsequently, by the pursuer. Nor was it known to what extent the questions on the "moneysupermarket.com" or the "comparethemarket.com" websites mirrored the questions in the GoSkippy website. For example, were there questions enabling the defender to explain his particular circumstances? The pursuer had to prove that the defender made a "deliberate" misrepresentation. If the court accepted that the defender did live principally at Dinard Drive, then there was no misrepresentation, and certainly not a deliberate misrepresentation. That reasoning applied even more strongly if the court found that the defender lived at both addresses: the precise questions put to the defender had not been established in evidence.

() 64. Accordingly the court was invited to refuse the declarator sought; to sustain the defender's first, third and fourth pleas-in-law; and to grant absolvitor. The plea of "no title to sue" had been included because the other two insurance companies had not been involved. The plea could also be regarded as an "all parties not called" plea. Whatever the format, the court was invited to have regard to the absence from the present action of the two other companies.

Reply for the pursuer

() 65. Counsel referred to the Marine Insurance Act 1906, section 24(2); the Scottish Law Commission Report No 219, "Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation", para 2.3; and the dicta of Lord Mustill at page 518 of *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501. He submitted that as a result of the severable liability in the pursuer's insurance contract, each of the three

companies (Southern Rock, Alwyn, and Pinnacle) had a "distinct contract" with the defender. While there was only one insurance document, there were in reality three contracts. Thus the pursuer had title to sue in the current action. Decree in the current action would have no effect on Pinnacle's contract or Alwyn's contract: if third parties made claims against either Pinnacle or Alwyn in terms of section 151 of the Road Traffic Act 1988, those companies would have to make payment. Equally if a third party made a claim against Southern Rock, it was no defence to say that claims could be made against Pinnacle or Alwyn: hence the need for the present action. The three companies' liability was several (cf McBryde, *Law of Contract*

in Scotland, 3rd Edition, paras 11-01, 11-06 and 11-24). As a matter of law, the pursuer had title to sue in respect of its distinct contract. Any suggested change from a "no title" plea to an "all parties not called" plea was opposed. The pursuer had title to sue, and defender's the "no title" plea was without foundation. But if the court found for the defender, there should be decree of dismissal, not absolvitor, as the three insurance companies acting together might seek to bring another action. It was unfortunate that the plea of "no title" had not been taken to a procedure roll debate.

() 66. In relation to the private car insurance proposal form (6/2) and the answers given by the defender in March 2015, counsel invited the court to be sceptical about the defender. The information given by the defender when interacting via computer with the website was contained in the hard copy proposal form.

() 67. It was not accepted that Miss Liston was wrong about her dates. Reference was made to the proposal form, and the defender's own evidence that he had bought the car at the beginning of 2015. Further, any argument that someone might live partly at one address, and partly at another, and therefore that there might be subtleties about completing an online pro forma questionnaire, was not the case pled by the defender on record. Nor was it the defender's position at the outset of his evidence, when his evidence appeared to be that he lived at all material times at Dinard Drive. Had the more complex arrangement now attempted to be advanced been pled on record, the defender's cross-examination and resultant evidence might have been different. The more complex arrangement being suggested was not open to the defender on the pleadings as they stood.

() 68. The court was again invited to sustain the pursuer's first plea-in-law, and to grant declarator in the amended terms.

Final response for the defender

() 69. The amendment to the conclusion did not resolve matters, nor make clear what the declarator would mean if a third party were to sue the defender. The authorities referred to were irrelevant: reference to Lloyd's underwriters and marine insurance were not appropriate in the context of consumer car insurance. The 2012 Act (which was intended to protect consumers) replaced the common law, and its terms governed the present case. A driver was expected to have one policy, and one insurance certificate. In the present case, the proper approach in law was that the defender had one contract of insurance, and not three.

() 70. The question of absolvitor or dismissal was a matter for the court. It was not known why the "no title" plea had not been taken to debate. However, once evidence had been led, the court was entitled to grant absolvitor.

Discussion

Common law or statute

() 71. There was no dispute that the Consumer Insurance (Disclosure and Representations) Act 2012 applied to the circumstances of this case, rather than the pre-existing common law.

The pleadings

() *Amendment*. At the beginning of the proof, the first conclusion was in the following terms:

> "1. For declarator in terms of section 152(2) of the Road Traffic Act 1988 that the pursuer was and is entitled to avoid the whole policy of insurance, policy number GSPC7020320810, in respect of a Ford Fiesta Zetec ('the Car'), registration number PE10 ACY, which policy was granted by the pursuer to the defender on or about 27 March 2015, as varied to include the Car on or about 31 October 2015, such avoidance of the policy being on the grounds that it was obtained from the pursuer by the defender (i) by the non-disclosure of material facts and (ii) by representation of fact which was false in material particulars."

() Following submissions, counsel for the pursuer was permitted to amend the conclusion by deleting the words from "such avoidance of the policy" to the end of the conclusion.

() *Case not pled*. In the course of his submissions, counsel for the pursuer argued that the position ultimately adopted by the defender (namely living partly at 6 Dinard Drive, and partly at Calder Street), had not been pled on record and was not therefore an option open to him (see para 67 above). However as the defender's evidence on those matters was led without objection, and the evidence is out and before the court, I do not accept counsel's submission.

Credibility and reliability

() 72. In general, I found all the witnesses to be credible and reliable. Some inconsistencies emerged. For example, difficulties with dates; conflicting reasons for the defender leaving 6 Dinard Drive in March 2016; the extent to which the defender's brother Hussain lived with the defender and his sister; and the question whether or not the defender received personal correspondence addressed to him at 6 Dinard Drive. In my view however those matters did not affect the core issues in this case, or the conclusions which I have ultimately reached.

Whether a deliberate or reckless misrepresentation

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73. In terms of sections 2 to 5 of the Consumer Insurance (Disclosure and Representations) Act 2012, the onus is upon the pursuer to prove that the defender either deliberately or recklessly misrepresented his address as 6 Dinard Drive (a "qualifying misrepresentation"). A remedy then available is the avoidance of the policy (sections 4 and 5 of the 2012 Act, and schedule 1). When assessing whether a representation was made deliberately or recklessly, all the circumstances must be taken into account, including the type of communication used, the terms of any question put (cf section 4(2)(c) of the 2012 Act) and the opportunity given to the consumer to qualify or particularise any response, or to provide non-standard information.

0 74. In my opinion, the onus of proof resting on the pursuer has not been satisfied in the present case, for the following reasons.

0 75. On the evidence, it would appear that the defender interrogated computer websites designed to allow the consumer to carry out a comparative search amongst various insurance companies to find suitable terms and a premium, enabling the consumer to proceed to purchase a particular insurance. In submission, the suggestion was that, having inserted certain information into the comparative website, and the consumer's responses having been processed, the consumer would be advanced online from the comparative website to the chosen insurers' website, where the insurance contract could be completed. However one consequence arising from that online processing of questions and answers is that, in this particular case, this court has no clear evidence about the precise wording of the contemporaneous questions which appeared on the computer screen in either the comparative website or the chosen insurers' website. There was no evidence that a printed version of the exchange (ie precise questions put, resulting in the answers given by the defender) became available at the time, thus recording and conserving the terms of the questions and answers. There was no evidence that the wording in the comparative website, inviting the submission of information from the defender, precisely matched the wording of the questions in the insurers' website, nor was it clear whether questions in the insurers' website had to be answered afresh, or whether information submitted by the defender to the comparative website was "auto-filled" into spaces in the insurers' website. It should also be noted that there was no evidence and no submission that the defender had experimented with the two addresses (Govanhill and Giffnock) to discover which address produced the lower premium.

0 76. In my opinion, the online method of purchasing insurance adopted in this particular case has both advantages and disadvantages. Obvious advantages include accessibility to the consumer and an ability to conclude a contract for insurance immediately, in any environment with access to a computer. However there may be disadvantages, especially in a case such as this. For example, there may be no clear record of the precise wording of the questions which elicited information from the consumer. There may have been alterations in the wording on the website following upon the relevant event. The questions in the pro forma online website might not be sufficiently flexible to accommodate non-standard or qualified information which the consumer would have given in, for example, a face-to-face interview, or in a written form which permitted some narrative or explanation from the consumer

() 77. In the present case, number 6/2 of process (lodged by the pursuer) was a printed form headed "Private Car Proposal Form", bearing to contain the information supplied by the defender when he took out the insurance policy. But on the evidence, a copy of that form was not made available to the defender either shortly after the completion of the insurance contract, or at any stage thereafter. It would appear that the hard copy printed form was generated by the pursuer, from its own records, solely for the purposes of the present action. Counsel for the pursuer accepted that computer website interfaces are changed and up-dated on a regular basis (number 6/9 of process, containing information provided by moneysupermarket.com, appears to confirm that), and there was no evidence vouching the format or content of the website(s) with which the defender interacted.

() 78. In such circumstances, the contention that the defender "deliberately" or "recklessly" misrepresented to the insurers that his address was "6 Dinard Drive, Giffnock" could only be established, in my opinion, if it could be proved that, at the time of seeking the insurance, the defender could not, on any view, claim 6 Dinard Drive as his "address". In any more nuanced situation (for example, living partly at 6 Dinard Drive and partly at Calder Street, with possibly more time spent at one address than the other), the precise wording of the questions put to the consumer would be essential to assist in demonstrating that there had been a deliberate or reckless misrepresentation made to the insurers, and to permit the court to reach a conclusion on that matter.

() 79. The present case disclosed, in my opinion, such a nuanced situation. Having carefully considered the evidence of Melanie Liston, the defender, Abdul Majid, Hussain Hafeez, and Kashif Majid, I am satisfied on a balance of probabilities that the defender, at the relevant time, lived partly at 6 Dinard Drive and partly at 387 (and

subsequently 375) Calder Street. It is not possible, on the evidence, to conclude how an average week or month was divided between Dinard Drive and Calder Street, but I am satisfied that the defender lived and slept overnight at both addresses during the relevant period. In so concluding, I do not disbelieve or reject the evidence of Miss Liston. But the evidence which she gave (an outline of which is set out in para 9 et seq above) was, in my view, entirely consistent with a situation in which an individual spent overnight sometimes at Calder Street, and sometimes elsewhere: in other words, an individual who lived partly at Calder Street, and partly at 6 Dinard Drive.

() 80. In these circumstances, the information that the defender's "address" was "6 Dinard Drive, Giffnock" cannot, in my view, be categorised as a deliberate or reckless misrepresentation. I accept that the Calder Street address appeared on the defender's business documentation, and that Calder Street appears to have been the address to which communications were sent: but if a person is living at two addresses, it may indeed be convenient to select one address as a post box.

() 81. The conclusion which I have reached is sufficient for the resolution of the case. It is therefore unnecessary to address questions relating to title to sue, all parties not called, or the effect which granting the declarator would have. Obiter, it seemed to me that there was

force in the defender's submissions that intimation should have been made to the other insurance companies, Alwyn and Pinnacle; but equally the more appropriate plea-in-law might have been "all parties not called".

Decision

() 82. For the reasons given above, I shall sustain the third and sixth pleas-in-law for the defender, and assoilzie the defender from the conclusions of the summons. I reserve meantime any question of expenses.